

**IN THE SUPREME COURT  
OF THE STATE OF MISSOURI**

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**NO. SC83719**

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**DAVID BRIZENDINE,**

**Plaintiff/Respondent,**

**vs.**

**NORA LEE CONRAD,**

**Defendant/Appellant.**

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**REPLY BRIEF OF APPELLANT NORA LEE CONRAD**

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**Lee R. Hardee, III  
Missouri Bar No. 40991  
F. Russell Peterson  
Missouri Bar No. 39284**

**HARDEE & PETERSON, LLC  
11411 W. 87<sup>th</sup> Terrace  
Overland Park, Kansas 66214  
Telephone No. (913) 438-4800  
Facsimile No. (913) 438-4844**

**ATTORNEYS FOR APPELLANT NORA LEE CONRAD**

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**POINT RELIED ON**

**1. The Court of Appeals decision reversing the Trial Court's award to Brizendine for statutory waste damages pursuant to RSMo. § 537.420 in the amount of \$33,760.35 should be affirmed because the Trial Court award was against the weight of the evidence, and the Trial Court erroneously applied the law, in that Brizendine elected to retain the liquidated damages under the Lease/ Purchase Agreement which included damages for waste, thereby precluding a separate award for statutory waste damages as an impermissible double recovery for the same injury, under the facts of this case.**

*Brizendine v. Conrad*, -- S.W.3d --, 2001 WL 339471 (Mo. App. W.D. April 10, 2001)

*Warstler v. Cibrian*, 859 S.W.2d 162, 165 (Mo. App. W.D. 1993)

*Bold v. Simpson*, 802 F.2d 314, 321 (8<sup>th</sup> Cir. 1986)

*Kincaid Enterprises, Inc. v. Porter*, 812 S.W.2d 892, 900 (Mo. App. W.D. 1991)

*Vogt v. Hayes*, 54 S.W.3d 207, 211 (Mo. App. S.D. 2001)

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*State v. Eversole*, 332 S.W.2d 53, 57058 (Mo. App. E.D. 1960)

## **ARGUMENT**

**1. The Court of Appeals decision reversing the Trial Court's award to Brizendine for statutory waste damages pursuant to RSMo. § 537.420 in the amount of \$33,760.35 should be affirmed because the Trial Court award was against the weight of the evidence, and the Trial Court erroneously applied the law, in that Brizendine elected to retain the liquidated damages under the Lease/ Purchase Agreement which included damages for waste, thereby precluding a separate award for statutory waste damages as an impermissible double recovery for the same injury, under the facts of this case.**

The problems facing Respondent began with the act of Brizendine drafting a contract, which mixed the agreement to lease the premises, and the contractual obligations related thereto, with the agreement to purchase the premises, and the contractual obligations related thereto. As drafted by Brizendine, paragraph 14 of the Lease/Purchase Agreement (the "Liquidated Damages clause) encompasses liquidated damages not only for any breach relative to the purchase of the premises, but also to any breach relative to obligations arising out of the lease portion of the Agreement, which included obligations not to commit waste.

*Brizendine v. Conrad*, --S.W. 3d --, 2001 WL 339471 (Mo. App. W.D. April 10, 2001).

This case does not turn on a violation of public policy as Brizendine urges, but on the more basic and simplistic concept of the choices and decisions made by Brizendine relating to his “exercise of a right to proceed in tort instead of proceeding in contract.” *Substitute Brief of Respondent*, p. 16. It is true that Brizendine attempted to, and did, exercise his right to proceed in tort against Conrad. Brizendine states that “Conrad claims that Brizendine’s acceptance of liquidated damages forecloses Conrad’s public duty to refrain from the commission of waste” *Id.* Brizendine’s argument completely misses the mark. It is the act of Brizendine’s retention of the \$15,000 dollars as liquidated damages, which included full damages for waste, under the Lease/Purchase Agreement that precludes him from obtaining a second or double recovery for the same injury, an impermissible result under Missouri law. When Brizendine retained this money as liquidated damages, he also recovered what he contractually agreed were his complete and full damages for waste. There is nothing in the Lease/Purchase Agreement that violates public policy. Similarly, the Court of Appeals decision below does not violate the “rule of law” Brizendine claims existed for 40 years prior to the Court of Appeals decision in this case.

Brizendine chose to retain the \$15,000 dollars as liquidated damages. Brizendine wanted to retain the \$15,000 as damages solely for the breach of the purchase agreement, and then seek damages for waste pursuant to RSMo. §537.420. The record makes it clear that Brizendine dismissed his contractual

theories of recovery in an attempt to avoid the exact result handed to him by the decision of the Court of Appeals.

Brizendine's initial Petition contained three counts:

Count I, Specific Performance; Count II, Petition for Damages; and Count III, Petition for Rent. (R. Vol. I, pp. 1-11). Brizendine then filed a First Amended Petition containing four counts: Count I, Damages in Lieu of Specific Performance; Count II, Petition for Rent; Count III, Action for Waste; and Count IV, Petition in Quasi Contract. (R. Vol. I, pp. 39-52). Conrad filed an Answer (R. Vol. I, pp. 29-35) and Counterclaim. (R. Vol. I, pp. 12-17). Conrad asserted that Brizendine accepted the \$15,000.00 as liquidated damages precluding any claims regarding the purchase or lease of the premises, including damages for waste. Conrad contended that Brizendine had breached the contract by failing to comply with various provisions therein. Conrad also raised Brizendine's acceptance of the \$15,000 as election of his remedy and full payment of any damages claimed in the Amended Petition. (R. Vol. I, pages 30-34)(Answer to Plaintiff's First Amended Petition).

Conrad filed a Motion for Judgment on the Pleadings raising the issue of the Liquidated Damages provision precluding an award of additional damages in the litigation. (R. Vol. I, p. 036-059). Brizendine filed Suggestions in Opposition (R. Vol. I, p. 060-65). The Trial Court then heard, and overruled, Defendant's Motion for Judgment on the Pleadings on August 2, 1999. (R. Vol. I, p. 135) (Docket Sheet).

On November 5, 1999, Brizendine dismissed all claims and counts of his Petition, with the exception of Count III, Action for Waste, pursuant to RSMo. §§ 537.420, 537.480 and 537.490 (1994). (R.Vol. I, p. 069). The case was tried to the Court on December 3, 1999, on the single count claiming statutory waste, and Conrad's Counterclaim. On January 3, 2000, the trial court entered judgment for Brizendine and awarded statutory waste damages of \$11,253.45, trebled to \$33,760.35, all pursuant to RSMo. §537.420. (R. Vol. I, p. 182-183). The Trial court also found for Brizendine on Conrad's Counterclaim.

Brizendine, by dismissing all causes of action except the action for statutory waste, and by retaining the \$15,000 dollars under a liquidated damages clause he drafted to encompass both purchase damages and waste damages, elected to receive his compensation for waste damages pursuant to the contract. The Court of Appeals correctly concluded and held that the Liquidated Damages clause found in paragraph 14 of the Lease Purchase Agreement did encompass damages for waste and reversed the Trial Court's award for statutory waste as an impermissible double recovery. Brizendine could have returned the liquidated damages funds to Conrad, or paid them into Court, pending the resolution of his claims and proceeded to litigate both theories of recovery, contract and tort. Brizendine then could have submitted the case claiming damages for breach of the purchase portion of the Lease/Purchase Agreement in contract, and for statutory waste damages under RSMo. §537.420. As a result, the Court of Appeals correctly concluded, under the facts specific to this case, that Brizendine cannot

recover under the Liquidated Damages provision of the Lease/Purchase Agreement, which included waste damages, and then recover a second time for the same injury, waste damages, pursuant to a statutory theory found in RSMo. §537.420.

**A. Brizendine Cannot Receive Duplicative Damage Awards For The same Injury.**

Conrad's argument is, and has been, that Brizendine's election to retain the \$15,000 dollars pursuant to the Liquidated Damages provision of the Lease/Purchase Agreement (paragraph 14) had the effect of precluding a separate claim for Statutory Waste pursuant to RSMo. §537.420.

The Missouri Court of Appeals, Western District, in the decision below, correctly determined that paragraph 14 of the Lease/Purchase Agreement was an enforceable liquidated damages clause, and that the liquidated damages provided for by Brizendine and Conrad "take the place of any actual damages suffered and any recovery for breach is limited to the amount agreed upon." *Brizendine v. Conrad*, --S.W. 3d --, 2001 WL 339471 (Mo. App. W.D. April 10, 2001).

Brizendine clearly could have sued Conrad for Breach of Contract, made a tort claim for waste, and filed other potential claims for relief involving other available remedies. In fact, Brizendine initially pursued this course of action. While Brizendine was "entitled to proceed on various theories of recovery, the theories must be pursued with caution." *Bold v. Simpson*, 802 F.2d 314, 321 (8<sup>th</sup> Cir. 1986). Brizendine could not, and cannot now, receive duplicative damages,

instead Brizendine must establish a separate injury under each theory. *Id.* This he cannot and did not do. “A single transaction may invade more than one right, and the person injured may sue on more than one theory of recovery.” *Kincaid Enterprises, Inc. v. Porter*, 812 S.W.2d 892, 900 (Mo. App. W.D. 1991)(citing *Ross v. Holton*, 640 S.W.2d 166, 173 (Mo. App. 1982). “The plaintiff, however, may not be made more than whole or receive more than one full recovery for the same harm.” (*Id.*)

In *Kincaid*, the Plaintiff presented a claim sounding in contract and in tort. The *Kincaid* court observed that:

The compensation the *Kincaid* evidence undertook to prove was the benefits and gain it would have made under the contract had its terms been performed. Thus, the proven damages for both the breach of contract and for the tort were the same, and merged. *Bold v. Simpson*, 802 F.2d 314, 321 [7] (8<sup>th</sup> Cir. 1986). *Kincaid* was entitled to be made whole by one compensatory damage award, but not to the windfall of a double recovery. [N.4] A double recovery is a species of unjust enrichment and is governed by the same principles of preventative justice. *Twellman v. Lindell Trust Co.*, 534 S.W.2d 83, 94 [16, 17] (Mo. App. 1976). Thus, instructions that allow a jury to return damages that overlap or duplicate are error. *Clayton Brokerage Co. of St. Louis*, 632 S.W. 2d 300, 306 [11, 12] (Mo. App. 1982).

*Kincaid*, 812 S.W.2d 892, 900-901.

Where the “proven” damages for breach of contract and tort were the same, they merged. *Id.* (citing *Bold v. Simpson*, 802 F. 2d 314, 321[7] (8<sup>th</sup> Cir. 1986)); *See also Vogt v. Hayes*, 54 S.W.3d 207, 211 (Mo. App. S.D. 2001) (“If the proven damages for both the breach of contract and for the tort are the same, then the damage award merges.”). In this case, Brizendine’s damages for waste pursuant to a contractual theory for waste, and the claim for waste damages pursuant to RSMo. §537.420, merged as a result of Brizendine’s retention of the liquidated damages because they necessarily come from the same proof and the same injury, the waste alleged to have been committed by Conrad.

Brizendine correctly cites this Court to the decisions in *Grus v. Patton*, 790 S.W.2d 936 (Mo. App. E.D. 1990), *American Mortgage v. Hardin-Stockton*, 671 S.W.2d 283 (Mo. App. W.D. 1984) and *State v. Eversole*, 332 S.W.2d 53, 57058 (Mo. App. 1960), for the proposition that “[m]issouri law provides that plaintiffs may sue for both contract and tort remedies where a single act violates both public and private duties.” (*Substitute Brief of Respondent*, p. 13). Brizendine also cites the Court to the decision in *State v. Eversole*, where the Court stated:

In order to determine the character of the action, whether ex contractu, or ex delicto, it is necessary to ascertain the source of the duty claimed to have been violated. If this duty is not imposed merely by the contract, then any action for the breach thereof is necessary to ascertain the source of the duty claimed to have been violated. If this duty is not imposed merely by the contract, then any action for the breach thereof is necessary ex contractu ...

On the other hand, if a party sues for a breach of duty prescribed by law as an incident of the relation or status which the parties have created by their agreement, the action may be one in tort, even though the breach of duty may also be a violation of the terms of the contract.

332 S.W.2d at 57-58.

Brizendine further cites the *American* decision for the proposition that “[t]he negligent failure to observe and perform any portion of that [contractual] duty gives rise to an action in tort as well as an action for breach of contract.” (*Substitute Brief of Respondent*, p. 16)(*quoting American*, 671 S.W.2d at 295. As a result of the foregoing case law, Brizendine reaches the conclusion that “[t]herefore, a mere contract cannot foreclose any parallel rights to a tort remedy where an act violates both public and private duties.” *Id.* Conrad agrees with Brizendine’s statement to the extent that the contract itself in this case does not foreclose any parallel rights to a tort remedy. It is not the Lease/Purchase Agreement that operates to effect Brizendine’s tort remedy, but Brizendine’s actions in taking the benefit of the Liquidated Damages clause to recover waste damages, and then proceeding under a tort cause of action for the same injury for which he has already recovered his full damage pursuant to contract.

“Liquidated damages and actual damages generally may not be awarded for the same injury.” *Warstler v. Cibrian*, 859 S.W.2d 162, 165 (Mo. App. W.D. 1993). That is exactly what happened in the Trial Court. Brizendine, by his own actions and decisions, limited his recovery for the single injury of waste to the

\$15,000 he retained pursuant to the Liquidated Damages clause of the Lease/Purchase Agreement, and the Court of Appeals decision reversing the Trial Court's judgment must be affirmed.

### **CONCLUSION**

The Court of Appeals decision correctly determined that Brizendine was entitled to only one recovery for waste damages as a result of the \$15,000 retained as liquidated damages, including damages for waste. The decision in *Brizendine v. Conrad* below does not violate Missouri law or public policy and correctly applies the law of the State of Missouri, this Court, and the lower courts of this State, to the specific facts of this case. Brizendine, by his own actions, choices, decisions and/or trial strategy chose to retain the liquidated damages for waste, and to then seek a second recovery for the same injury, waste damages, when other options, remedies and causes of action were available. If Brizendine is allowed to recover a second time for the same waste damage injury it would constitute an impermissible double recovery: a result not allowed under Missouri

law. The decision of the Trial Court must be reversed, and the decision of the Court of Appeals affirmed.

Respectfully submitted:

HARDEE & PETERSON, LLC

By: \_\_\_\_\_  
Lee R. Hardee III            MO #40991  
F. Russell Peterson        MO #39284  
11411 W. 87<sup>th</sup> Terrace  
Overland Park, Kansas 66214  
Phone (913) 438-4800  
Fax (913) 438-4844  
ATTORNEYS FOR APPELLANT  
NORA LEE CONRAD

**CERTIFICATE OF COMPLIANCE**

I, Lee R. Hardee III, the undersigned, do hereby certify that the Reply Brief of Appellant Nora Lee Conrad includes the information required by 55.03 and 84.06; and complies with the limitations contained in 84.06(b) in that there are 2,799 words in the brief prepared in Microsoft Word 2000, it does not exceed 27,900 words, based upon the word count of Microsoft Word 2000 used to prepare the brief.

\_\_\_\_\_  
Lee R. Hardee III MO #40991

### **CERTIFICATE OF MAILING**

The undersigned hereby certifies that two (2) copies of the above and foregoing document along with a disk which is certified to be virus free, was mailed, postage pre-paid, this \_\_\_\_\_ day of \_\_\_\_\_, 2001, to the following:

Mr. Timothy T. Stewart  
Brydon, Swearengen & England P.C.  
312 East Capital Avenue  
P.O. Box 456  
Jefferson City, MO 65102-0456

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